



Comptroller General
of the United States
Washington, D.C. 20548

123417

Decision

Matter of: Marlen C. Robb & Son, Boatyard & Marina, Inc.
File: B-256516
Date: June 28, 1994

Marlen C. Robb, Jr., for the protester.
Mary S. Byers, Esq., Department of the Army, for the agency.
Katherine I. Riback, Esq., and Paul Lieberman, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Agency reasonably considered for bid evaluation purposes the actual cost to the government of delivering and returning a vessel, along with the bid price, where the agency was responsible for transporting the vessel to and from the contractor's facility.
2. Differential rates for recovery of liquidated damages are permissible where the rates are reasonably related to the actual costs the agency will incur at local versus nonlocal contractor facilities.
3. Protest that specifications limiting the contract performance period to 45 calendar days, including the vessel's travel time, unreasonably restrict competition, is denied where the agency reasonably determined that the specified performance period was necessary to satisfy the agency's minimum needs regarding project management.

DECISION

Marlen C. Robb & Son, Boatyard & Marina, Inc. protests certain provisions in invitation for bids (IFB) No. DACW17-94-B-0009, issued by the Department of the Army for furnishing the necessary labor, equipment, and materials to repair and modify the U.S. Surveyboat Florida.¹ Robb

¹The vessel is used by the agency to perform predredging and postdredging surveys of ship channels. The vessel is also used to gather channel depth data which is furnished to the U.S. Coast Guard for making changes in the placement of channel markers.

contends that these provisions unduly restrict competition and discriminate against nonlocal contractors.

We deny the protest.

The solicitation, issued on January 3, 1994, provided for award on the basis of price and price-related factors. The solicitation provided that, for evaluation purposes, the cost to the agency to deliver the vessel from Fernandina Beach, Florida, to the contractor's facility, and then back to Fernandina Beach upon completion of the required work, would be considered at the rate of \$10.81 for each nautical mile of vessel travel. The IFB provided that it was intended that the vessel be out of service for no longer than 45 calendar days due to work under the contract. To this end, the solicitation stated that the 45-calendar-day availability period included the travel time necessary to transport the vessel to and from the vessel's duty station, along with the time necessary to perform the required work. The solicitation also stated that in the event the contractor failed to perform the services in the required time frame, the contractor was obligated to pay the government liquidated damages in the amount of \$1,128 per calendar day of delay if the work is performed outside of the Florida counties of Duval, Clay, Nassau, or St. Johns, and \$876 per calendar day if the work is performed within those counties.

On January 10, Robb filed an agency-level protest contesting certain provisions of this solicitation. The protest was denied on February 14. This protest to our Office followed. The agency has postponed bid opening pending resolution of the protest.

Robb objects to the agency's consideration for evaluation purposes of the cost to the agency of delivering and returning the vessel at a fixed rate of \$10.81 a nautical mile; Robb maintains that this is arbitrary and serves only to keep nonlocal contractors from competing for the work.

The Competition in Contracting Act of 1984, 10 U.S.C. § 2305(b)(3) (1988), provides that in the case of sealed bidding, agencies will award contracts considering only price and other price-related factors included in the solicitation. Federal Acquisition Regulation (FAR) § 14.201-8 (FAC 90-1) identifies price-related factors that may be applicable in the evaluation of bids as "[f]oreseeable costs or delays to the [g]overnment resulting from such factors as differences in inspection, locations of supplies, and transportation."

Here, the \$10.81 estimated cost per mile is based on calculations which reflect the incurred costs for fuel, crew salary, and per diem allowance, plus a vessel depreciation

allowance. Daily costs are divided by the average 150-mile daily travel radius, and the resulting \$10.81 per mile figure thus reasonably estimates the actual current costs to the agency of transporting the vessel. Inclusion of these transportation costs in evaluating the bids ensures that the government will obtain the lowest actual cost. While a nonlocal facility is assessed a higher transportation charge, the charge simply reflects an actual cost to the government, which is entitled to consider this cost in evaluating bids. This is precisely the type of cost encompassed by FAR § 14.201-8 and its inclusion in the evaluation therefore is unobjectionable.

Next, Robb argues that the solicitation provision charging nonlocal contractors a higher rate of liquidated damages than local contractors restricts competition to local contractors.

The FAR authorizes a procuring agency's use of liquidated damages clauses in instances where timely performance is such an important factor that the government may reasonably expect to suffer damages if performance is delinquent, and the extent or amount of such damages will be difficult or impossible to ascertain or prove. FAR § 12.202(a). The rate of liquidated damages imposed must be reasonable and bear some relationship to the losses contemplated. FAR § 12.202(b). Before this Office will rule that a liquidated damages provision imposes an impermissible penalty, the protester must show that there is no possible relationship between the solicitation's specified liquidated damages rates and reasonable contemplated losses. Ameriko Maintenance Co., B-224087, Dec. 19, 1986, 86-2 CPD ¶ 686.

The liquidated damages rates for local shipyards is lower than that for nonlocal shipyards under the IFB here because the agency inspection costs for local shipyards are lower, due to the fact that inspectors do not receive a per diem allowance. The higher rate simply reflects inclusion of the inspector's per diem entitlement. The liquidated damages provisions do not create any unreasonable liability for the contractor, and the differential rates bear a reasonable relationship to the actual costs the agency will incur. Accordingly, the provisions do not constitute a penalty and are not otherwise an unreasonable exercise of agency discretion. R Squared Scan Sys., Inc., B-249917 et al., Dec. 23, 1992, 92-2 CPD ¶ 437

Finally, Robb argues that the time for performance of the required work should not include the travel time of the vessel to and from the contractor's ship repair yard. According to the protester, this solicitation provision also

serves to restrict the solicitation to local contractors, since they will have more time to perform the work (i.e., since there will be less travel time) than nonlocal firms.

In preparing for the procurement of supplies or services, the procuring agency must specify its needs and solicit offers in a manner designed to achieve full and open competition so that all responsible sources are permitted to compete. 10 U.S.C. § 2304(a) (1988). A solicitation may include restrictive provisions only to the extent necessary to satisfy the needs of the agency or as otherwise authorized by law. 10 U.S.C. § 2305(a)(1)(B). Where a solicitation provision is challenged as restrictive, the procuring agency must provide support for its belief that the challenged provision is necessary to satisfy its needs. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether the explanation can withstand logical scrutiny. Absecon Mills, Inc., B-251685, Apr. 19, 1993, 93-1 CPD ¶ 332.

Here, the agency explains that it specified the 45-calendar-day performance period based on its need to have the vessel available for surveys as soon as possible. The agency contends that if the amount of time that the vessel was to be out of service varied depending on the location of the awardee, then the effect on project management would be extremely disruptive. According to the agency, it would be difficult to schedule surveys and this would in turn affect the scheduling of the projects dependent on surveys, such as dredging contracts, and the movement of channel markers. We find nothing unreasonable in the agency's concern, and the firm 45-day requirement clearly is a legitimate means of addressing it. Robb has not shown otherwise.

The propriety of a particular procurement is not judged by whether every potential contractor is included but, rather, from the perspective of the government's interest in satisfying its requirements at reasonable prices through adequate competition. Agua-Trol Corp., B-246473, Mar. 5, 1992, 92-1 CPD ¶ 262. There is no requirement that an agency understate its minimum needs merely to increase competition; specifications which limit competition are not unduly restrictive so long as they reflect the government's

legitimate minimum needs. While the 45-calendar-day performance period may make it more difficult for nonlocal contractors to compete, this fact alone does not render this otherwise unobjectionable requirement improper.

The protest is denied.



for Robert P. Murphy
Acting General Counsel